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The uniform management and disposition of Construction law cases in Australia

Managing Construction Law Disputes in the Supreme Court of New South Wales- Issues and Innovations

Master Macready, Supreme Court of New South Wales

Introduction

1 An observation made in 1986 by the former Justice Smart of the New South Wales Supreme Court, in Abignano Ltd v Electricity Commission of New South Wales[1], to the effect that construction contracts in that State have long been "notorious" for their extremely tight profit margins remains decidedly the case today. Indeed this remains true notwithstanding the fact that the industry generally continues to enjoy what can only be described as boom conditions, with the value of construction work performed in New South Wales in 2003-04 estimated to be in the order of $26.1 billion.[2] Shortly stated, cash flow remains the life blood of many subcontractors, contractors and principals alike.

2 It is only when this general context is taken onto consideration that the imperative of the quick, just and cheap disposal of construction disputes- to borrow from the expressed 'overriding purpose' of the New South Wales Supreme Court Rules, to which I will turn later- is thrown into its proper relief. To this end the Court has at its disposal a number of procedural mechanisms designed to focus parties' time and expenditure on the real issues in dispute between them, being mechanisms which, although applicable to all proceedings, are of especial relevance to construction disputes. Those which I intend to deal with today include the 'fast-track' management of disputes via the use of specialist lists, the availability of court-annexed alternative dispute resolution in the form of arbitration or mediation and the power of the Court to reference proceedings out (or discrete issues therein) for inquiry and report by a referee. Additionally I propose to examine the utility of proportional costs awards as a means of maximising the efficiency of litigation, a concept derived from the 1996 Woolf Reforms in the United Kingdom and, to some degree, proposed to be implemented in New South Wales as one aspect of that jurisdiction's forthcoming Uniform Civil Procedure Rules.

3 Of course those present will already be familiar with the concept, if not the specific New South Wales form, of such procedures, demonstrating that any move towards national uniformity in this area may not be as daunting a task as it might first appear. As the attendees of the Australian Institute of Judicial Administration on cost-effective justice last month were reminded, "Modern case management ideas cut across traditional jurisdictional boundaries."[3]

4 Before turning to the substance of my address, however, it would be remiss of me in dealing with the management of construction disputes in New South Wales not to briefly mention a relatively recent, albeit non-procedural, reform in this area, the Building and Construction Industry Security of Payment Act 1999.[4] This Act provides parties to construction contracts in New South Wales with a statutory right to progress or milestone payments and access to an expedited adjudication procedure for the determination of disputes concerning such payments.[5] Critically, however, the Act sets up what has been deemed a "dual railroad track system"[6] in which statutory provisions concerning the quantum of progress payments, the value of the work to which they relate and the date upon which they become due and owing are applicable only insofar as the contract under consideration does not otherwise provide.[7]

5 A second important feature of the Act is that adjudication determinations, while representing an amount due and payable immediately upon the claimant filing an 'adjudication certificate' in the Court for enforcement as a judgment,[8] are both without prejudice to the final rights of the parties and delivered within extremely tight time frames.[9]

6 Finally, it should be noted that the Act has abrogated the effect of 'pay when paid' and 'pay if paid' clauses in construction contracts to which it applies,[10] whose operation in instances of disputation between head contractors and principals were considered to be unduly harsh on third party subcontractors.

7 The particular relevance of the Act to the present discussion is that it represents one means by

which parties to a construction dispute may readily access early and relatively inexpensive dispute resolution processes, albeit restricted in scope in to progress payment disputes specifically. In my experience, the availability of such processes is fundamental in view of the fact that large, strategic litigations, whose expense often escalates out of all proportion to the real issues in dispute, remain an unfortunate feature of construction disputes in New South Wales. Be they party or court-instigated, there is therefore a manifest need for a range of different procedural devices facilitative of the early resolution or settlement of such matters, or the availability of sanctions when case management or other obligations are not met by the parties or their representatives. The security of payment legislative scheme is one such device. Others are mediation, arbitration, references out, and the like, to which I now intend to turn. But there is always the capacity for further innovation in the quest to make the management of construction disputes more efficient, more proportional to the questions really in issue; and it is this area which, in my submission, any discussion as to national uniformity ought to focus.

Technology and Construction List Procedure

8 Construction proceedings commenced in the Supreme Court of New South Wales, whose jurisdiction is ordinarily restricted to matters involving claims in excess of $750,000,[11] are placed in the Technology and Construction List of the Court's Equity Division. This List, which is administered concurrently with the Commercial List of the Equity Division, is intended to facilitate the expedited disposition of proceedings commenced in or transferred to it, with matters subject to continual case management from the return date of the summons onwards.

9 At present there is in excess of 100 matters pending in the List, covering a broad range of subject-matter from general construction projects disputes, contractual disputes relating to the supply of construction materials or related services and infrastructure matters, to claims for administrative law relief in respect of adjudication determinations under the Security of Payments Act to which reference was made earlier.

10 Case management of the List takes place each Friday morning before the List Judge, presently The Hon Justice P.A. Bergin, where directions are given as to hearing preparations, ADR or reference proceedings, and Notices of Motion are listed for hearing.

11 For more detail on the specific managerial role of the List Judge, see the paper delivered by Justice Bergin to the Law Council of Australia's Construction and Infrastructure Seminar in Melbourne in May this year, available on the Supreme Court website.[12]

12 In view of the List's emphasis on efficiency and speed, proceedings are commenced in it by way of the special form of summons annexed to Practice Note 100 of the Supreme Court. The summons is required to be divided into four parts, with each part respectively containing the following information:

(a) In Part A, the plaintiff provides a broad outline of the nature of the dispute and a brief précis of the circumstances from which the claim is said to arise;

(b) In Part B, point form specifics of the issues of fact and/or law likely to arise must be set out;

(c) In Part C, the plaintiff must set out a summary of his, her or its contentions which, while there is an obligation to avoid formality, constitutes the primary pleading in the matter; and

(d) In Part D, any questions thought appropriate for reference are listed.

13 Additionally, Practice Note 100 dictates that:

(a) The proceedings are to be brought before the Court for an initial directions hearing on the return date for the summons.

(b) At the first and subsequent directions hearings, orders will be made as to matters including the preparation of statements of agreed issues, the making of admissions, the delivery or exchange or experts reports, the compilation of Scott Schedules, and so forth. Critically, orders relating to the provision of particulars, discovery or the administration of interrogatories "will be made only upon demonstrated need being established in respect of particular matters."[13]

(c) When matters are listed for hearing, the usual order for hearing contained in Annexure 3 of the

Practice Note will ordinarily be made, providing for (amongst other things) the filing and service of experts reports not les than 28 days prior to the hearing, the exchange of objections to affidavits not less than 14 days prior to the hearing and notice as to what documents are to be tendered at the hearing within that latter timeframe.

(d) An ongoing obligation is imposed upon the parties to give consideration as to whether the proceedings are suitable for alternative dispute resolution or reference out to a referee.

14 Parties are expected to prepare a timetable for the bringing of a matter to hearing, and are at liberty to apply to have the matter placed in the Friday list prior to the time set down for its next directions hearing. Should some timetable slippage occur and consensus as to the way to proceed can be reached, however, parties may approach the List Judge in Chambers for Consent Orders adjusting the timetable.

15 One final issue relating to the management of the Technology and Construction List I would like to address is the expansion in the use of information technology in both the management of documents and the taking of evidence. In my opinion, the submission of softcopy documents, the taking of evidence by video link, the provision of 'virtual data rooms' and the like should be encouraged as a potential means to significantly increase the efficiency of litigation. Indeed paragraph 27 of Practice Note 100 specifically reminds practitioners of the benefits of such techniques and advises that the court will, where appropriate, make orders requiring their use, potentially even in the absence of mutual party consent.

16 Additionally, Chief Justice Spigelman in March of this year issued Practice Note 127 dealing precisely with the 'Use of Technology in Civil Litigation.' Amongst other things, the Practice Note dictates that the "Court will expect the parties to consider preferring the use of technology to exchange information when they believe more than 500 documents between them will be discoverable",[14] and sets out the recommended electronic formats in which such documents should be placed before exchange or submission to the Court. It is critical that the court be involved early in the process so that the full benefits of the use of technology can be realised.

Court-Annexed Mediation

17 Part 72C r 2 of the Supreme Court Rules provides as a general obligation applicable to all proceedings that, on the first occasion when proceedings are before the Court for directions, each party must be prepared to address as to whether consent is given for the referral of the matter to mediation. In the event that such consent is present, parties are also expected to have conferred on the identity of the mediator and the manner in which his/her remuneration is to be borne.

18 In the event that parties are unable to agree as to the desirability of mediation, the Court nevertheless has power to compulsorily refer the proceedings to mediation pursuant to s 110K(1) of the Supreme Court Act 1970 (NSW). That subsection provides:

If it considers the circumstances appropriate, the Court may, by order, refer any proceedings, or part of any proceedings, before it (other than any or part of any criminal proceedings) for mediation, and may do so either with or without the consent of the parties to the proceedings concerned.

19 The benefits to be obtained from an early mediation of the dispute- be they settlement proper or, failing such outcome, the narrowing of the issues in dispute- are the subject of particular emphasis in the Technology and Construction List by virtue of Practice Note 100. Emphasising, as noted above, that consideration of the use of ADR procedures should be given throughout the interlocutory stages rather than merely at commencement, paragraph 24 of the Practice Note informs practitioners that:

Consideration of the use of alternative dispute resolution "ADR" procedures is encouraged. Apart from the requirement under the Rules that parties inform the Court when proceedings are first listed whether they consent to referral for mediation or neutral evaluation, the lawyers for the parties and the parties should have in mind the use of ADR procedures and the Judges will in appropriate cases draw attention to their possible use and require that failure to engage in ADR be explained.

20 Undoubtedly the availability of court-annexed mediation, when combined with the always-available capacity of the parties to undertake a purely consensual mediation, represents one of the critical procedural devices to which reference was earlier made by which the management and disposition of construction disputes may be made more efficient. The s 110K power to compulsorily refer

proceedings to mediation, however, must be exercised sagely and with full consideration of the fact that the raison d'etre of mediation, the key to its effectiveness, is the concept of 'party ownership' of the process. Unless the protagonists are prepared to sit down and genuinely attempt to reach compromise, then a compulsory reference may be conducive of little more than further time and costs thrown away. The epitome, that is to say, of a counter-productive exercise.

21 While understandable in view of the danger of such an outcome, the view that proceedings in which at least one party objects to a reference to mediation are never suitable for such a procedure itself has a number of shortcomings. In Remuneration Planning Corp Pty Ltd v Fitton[15], Hamilton J said:

Of course, there may be situations where the Court will, in the exercise of its discretion, take the view that mediation is pointless in a particular case because of the attitudes of the parties or other circumstances and decline to order a mediation. However, since the power was conferred upon the Court, there have been a number of instances in which mediations have succeeded, which have been ordered over opposition, or consented to by the parties only where it is plain that the Court will order the mediation in the absence of consent. It has become plain that there are circumstances in which parties insist on taking the stance that they will not go to mediation, perhaps from a fear that to show willingness to do so may appear a sign of weakness, yet engage in successful mediation when mediation is ordered.

22 Alternatively expressed, while the genuinely expressed and reasoned wishes of the parties will always be a persuasive consideration,[16] the demonstrable benefits of providing parties with the opportunity to confront issues directly in an intimate and confidential environment- rather than via the technical and bellicose media of pleadings and submissions- should never be excessively discounted.

23 In addition to cases in which the benefits of mediation may be lost sight of due to concerns regarding bargaining position, there are matters driven by concerns other than a desire to have the real issues in dispute determined. As stated by Austin J in Higgins v Higgins[17], regardless of the parties preferences in such cases:

referral may be appropriate where the Court is satisfied that the parties' approach to the resolution of the proceedings is being unduly influenced by emotional or irrational considerations, the effect of which might be minimised by a skilled mediator.

24 While His Honour was there speaking in the context of a family property dispute, the same might be said in the context of a long running, acrimonious and seemingly intractable construction dispute in which the parties have, either intentionally for strategic purposes or subconsciously due to the coming roar of battle, lost sight of the true origins and function of the litigation.

25 With a view to involving parties in the Court's power to refer proceedings to mediation, Practice Note 118 allows the parties to be referred to a registrar for an information session on the benefits of mediation before the Court reaches a conclusion on whether a reference to mediation proper is appropriate. It is also worth recording that experience dictates that mediation during the course of proceedings is often successful. This often occurs because issues have been partly ventilated and parties can se how much is still left in the proceedings.

Consensual Arbitration

26 Little, of course, needs to be said for the purposes of today's discussion concerning the benefits of a consensual submission to arbitration pursuant to the Commercial Arbitration Act 1984 (NSW). The (relatively) uniform national scheme of which that Act forms one component has, after all, been with us for two decades now, and its provisions comprehensively discussed elsewhere.

27 Thus it suffices to note that Part 72A r 1A of the Supreme Court Rules provides as a general rule that appeals to the Court against a decision of an arbitrator, or proceedings for a declaration of right that an award is not binding on a party, should be listed in either the Commercial List or the Technology and Construction list (whichever is applicable) so as to bring the matter to as rapid a conclusion as possible.

28 What I would like to address, however, is the reform options to the common s 38 of the uniform scheme recently proposed by the Standing Committee of Attorneys General. Presently, of course, that provision allows for the applicable Supreme Court to grant leave to appeal against a question of law

"arising out of" an award, provided that the determination of that question could "substantially affect the rights of one or more parties to the arbitration agreement" and there is either:

(a) a "manifest error of law on the face of the award"; or

(b) "strong evidence that the arbitrator ... made an error of law and the determination of that question may add, or may be likely to add, substantially to the certainty of commercial law."

29 The two key reform models, based upon the concern that the operation and wording of the existing appeal provisions has the potential to undermine the principle of finality in arbitration, are to either adopt the approach of Chapter VII of the UNCITRAL Model Law[18] (replicated almost verbatim in the New Zealand Arbitration Act 1996) or that of s 69 of the United Kingdom Arbitration Act 1996. Respectively, these options would involve dispensing holus bolus with a right of appeal against substantive errors of law, or retaining such a right but discarding the expression 'manifest error of law on the face of the award.'

30 As to the first option, Art 34 of the Model Law dictates that recourse to a court against an arbitral award may only be made when certain, largely procedural, irregularities have arisen during the course of the arbitration, including the invalidity of the submission, failure to give proper notice, the determination of matters not submitted for adjudication or the repugnance of the award to the public policy of the forum. Conspicuously, there is no capacity for a party to appeal against (or have 'recourse against', to adopt the Continental expression) what it considers to be substantive errors of law.

31 It is submitted that such a radical prioritising of arbitral finality over the principle of access to justice encapsulated by Lord Justice Scrutton's famous dicta that "there must be no Alsatia in England where the King's writ does not run"[19] is not suitable to the context of domestic Australian arbitrations. The Model Law was indented to apply, as dictated by Art 1, exclusively to "international commercial arbitration" (as defined), with the lack of any substantive right of appeal being justified on the basis that many such proceedings are conducted between large, sophisticated legal actors sufficiently well-resourced to protect own interests and unwilling to submit to the jurisdiction of potentially unfamiliar national courts. Indeed the uniform scheme already recognises that parties to international arbitrations must have more latitude to control the proceedings themselves, witnessed by the greater scope to oust appellate rights and the continued applicability of Scott v Avery clauses by and to such parties. [20]

32 But the domestic context is very different, particularly in the building and construction industry with its reputation for tight profit margins and overwhelming dependency on cash flow. For such parties, while the additional expense of pursuing an appeal to the Supreme Court is certainly undesirable, the inability to have recourse against a plainly or manifestly erroneous decision of law could be potentially disastrous. As stated by Justice Smart in Abignano Ltd v Electricity Commission of New South Wales, supra, in the following lengthy but highly pertinent passage:

In contrast to the London situation, there are relatively few international arbitrations in either New South Wales or Australia. The great majority of arbitrations here concern local building and engineering disputes. To date may of the matters relating to these which have come before the courts involve the construction of local contracts. Arbitrations of such local disputes are designed to achieve a private, prompt and speedy hearing and to lead to an earlier finality with restricted rights of appeal. This enables both parties to know where they stand and to carry on with their business. While a contractor often needs to have any money to which it is entitled without delay so as to carry on with its business and other projects, it does not wish to be precluded from obtaining such moneys by arbitral error which is not corrected ... Principals are wary about unexpected windfalls to a contractor as a result of an erroneous but arguable interpretation of a contract.[21]

33 Additionally, and finally in respect of the proposal to adopt the Model Law approach, the availability of a right of substantive appeal is of importance in ensuring consistency in the interpretation of boilerplate commercial clauses. In Pioneer Shipping Ltd v BTP Tioxide ("The Nema")[22], Lord Diplock emphasised that "it is in the interests alike of justice and the conduct of commercial transactions that those standard terms should be construed and treated by arbitrators as giving rise to similar legal rights and obligations in all arbitrations in which the events have given rise to the dispute do not differ from one another in some respect." This policy is presently reflected in s 38(5)(b)(ii) of the uniform scheme with its reference to the determination of questions of law likely to add substantially to the certainty of commercial law.

34 Of course, none of this is to say that the right of appeal against a substantive error of law should not be tightly circumscribed in view of the fact that the parties have voluntarily consented to submit to binding arbitral proceedings. Rather it is to submit that, especially in the construction industry for the reasons set out by Justice Smart in Abignano, it is appropriate in the domestic context to retain at least a bare right to such appellate review.

35 As to the second reform option, s 69 of the United Kingdom Arbitration Act provides that a party may appeal against an error of law "arising out of" an award if the determination of that question will "substantially affect the rights of one or more of the parties" and (inter alia):

(a) the decision of the arbitral tribunal on the question was "obviously wrong"; or

(b) the question is one of "general public importance and the decision of the tribunal is at least open to serious doubt"; and

(c) "that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question."

36 Thus it is evident that the UK appeal procedure remains very similar to that of the uniform scheme, with the exception (principally) that the concept of an error of law 'on the face of the award' has been jettisoned. It appears that the presence of this expression in s 38 is the source of the Attorneys' concern, given that:

(a) s 38(1) abolishes the court's jurisdiction, save as provided by s 38(2), to review an award for an error of fact or law 'on the face of the award'; but

(b) s 38(2) then provides a right of appeal against a question of law 'arising out of' an award; and then

(c) s 38(5)(b)(i), read cumulatively with s 38(2), provides that the error of law 'arising out of' the award must be 'manifest on the face of' that award.

37 The potential for confusion is then, to pardon the expression, manifest. Does the abolition of appeals against errors of fact or law 'on the face of the award' mean that the right of appeal against errors 'arising out of' the award is broader than the former concept? This was the view propounded by President Kirby (as His Honour then was) in the 1988 case of Wardley Pty Ltd v Adco Constructions Pty Ltd.[23] In the United Kingdom, however, it is settled that the expression 'arising out of' should be given a restrictive formulation such that the court cannot intervene unless it is apparent "from a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the [contract] clause by the arbitrator is obviously wrong." This was the view of Lord Diplock in The Nema, supra, and has clearly formed the basis for the use of the expression 'obviously wrong' in the present s 69 of the United Kingdom Act. Given this reading, does the expression 'manifest error on the face of the award' in s 38(5) expand the scope of review beyond errors 'arising out of' the award? This was the view of Commercial Division Chief Judge Rogers in the 1991 case of Promenade Investments Pty Ltd v State of New South Wales.[24] Or are the two expressions merely synonymous? This, in turn, was the view of Sheller JA on appeal in Promenade Investments.[25]

38 It is of course recognised that such difficulties of nomenclature are not common in practice; rare it is to find a party who, after having incurred the expense of both arbitral and first-instance appeal proceedings, is willing to take the matter further to the Court of Appeal. Nonetheless, the clumsy wording of ss 38(1), (2) and (5) is a latent defect in one of the most critical aspects of the uniform scheme that could potentially be overcome by an adoption of the more straightforward, less contradictory approach of the United Kingdom Act.

Court-Annexed Arbitration

39 The Supreme Court's power to compulsorily refer proceedings to arbitration under the Arbitration (Civil Actions) Act 1983 (NSW), which power is derived from s 76B of the Supreme Court Act, is for present purposes worthy of only cursory examination. This is because, while constituting another device available to the Court in order to potentially increase the efficiency of litigation, court-annexed arbitration is rarely used in the construction context.

40 Pursuant to Pt 72B r 1 of the Supreme Court Rules, proceedings in the Equity Division in which the

Court considers that the total value of all relief sought is likely to exceed $750,000 are not susceptible to a compulsory reference to arbitration. As noted above, $750,000 is the effective lower limit of the Supreme Court's jurisdiction, and thus few cases are in the List which would not be caught by Pt 72B r 1. Presumably, this restriction is founded upon the perceived injustice of the Court having the power to compulsorily divert parties to such high-stakes proceedings to a binding, adjudicative ADR process from which limited appeal rights exist.

References to Referees

41 The power of the Court to reference either the whole or part of proceedings out to a referee for determination is the most important and frequently used ADR mechanism in construction disputes in the Supreme Court of New South Wales. Indeed as discussed above, it is a requirement of Practice Note 100 that parties specifically identify on the List's special form of summons (and statement of defence) whether they consider any questions arising in the proceedings as being appropriate for reference. Indeed since 1990 a pro forma 'usual order for reference' has been annexed to Practice Note 100, indicating the commonality of that procedure in both commercial and construction disputes in the Supreme Court.

42 While the existing power of the Court to make orders for reference, contained in Pt 72 of the Rules, was introduced in 1986, the concept itself is by no means novel.[26] Indeed the first statutory provision dealing with references was found in s 3 of the United Kingdom Common Law Procedure Act 1854, which allowed for the reference of either the whole or part of proceedings when the dispute consisted "wholly or in part of Matters of mere account which ... [could not] conveniently be tried in the ordinary Way."[27] This power was re-enacted and enlarged by the Judicature Acts some two decades later, and substantially replicated by many of the Australian colonial legislatures. In New South Wales, for instance, the Supreme Court has been seized of a statutory reference power since the coming into force of the Arbitration Act 1892.

43 Notwithstanding this pedigree, the unique feature of the New South Wales Pt 72 reference procedure is that it provides for the reference out of the whole of proceedings, regardless of whether those proceedings involve matters of an especially technical or scientific nature. The breadth of this power is matched only by equivalent provisions in Victoria and the Australian Capital Territory, with the other Australian jurisdictions retaining more circumscribed reference mechanisms.[28] Part 72 r 1 (1) reads:

The Court may, in any proceedings in the Court, subject to this rule, at any stage of the proceedings, on application by a party or of its own motion, make orders for reference to a referee appointed by the Court for inquiry and report by the referee on the whole of the proceedings or any question or questions arising in the proceedings.[29]

44 Certainly it cannot be doubted that the availability of such a broad reference power is a procedural device of great utility in the construction context, allowing for the determination of highly technical issues in a manner that does not require the time and expense of presenting relevant material in a manner comprehensible to a lay judicial officer. As stated by the former Justice Campbell of the Queensland Supreme Court in the 1982 case of Honeywell Pty Ltd v Austral Motors Holdings Ltd[30]:

[t]here are often advantages in having the facts of building and engineering disputes and of some relating to trade and commerce decided by arbitration, for such a procedure may well be quicker and cheaper than submitting the issues to the ordinary processes of the law. Moreover, building disputes frequently involve the tribunal in a detailed examination of a large number of separate or unrelated items analogous to the taking of accounts. The arbitrator selected by the parties is generally a person well acquainted with the particular area of trade or commerce; he is chosen because of his knowledge and experience and the calling of numerous expert witnesses therefore becomes unnecessary.

45 Similarly in the 1991 case of Beveridge & Anor v Dontan Pty Ltd[31], Commercial Division Chief Judge Rogers expressed the opinion that:

[o]ne of the difficulties afflicting litigants today is the high cost of dispute resolution. One of the reasons for this is the requirement, in cases involving technical expertise, to educate the non-expert tribunal in the manifold matters of expertise brought before a court. Obviously that is unnecessary where the trier of facts is an expert. Thereby proceedings will be shortened and costs will be saved.

46 Moreover the potential time and cost savings flowing from the appointment of an expert referee are

complemented by the sheer flexibility of reference proceedings. Pursuant to Pt 72 r 8, subject to any directions of the Court to the contrary, a referee may "conduct the proceedings under the reference in such manner as the referee thinks fit" and, not being bound by the rules of evidence, may inform him or herself "in relation to any matter in such manner" as he or she sees fit.

47 The obverse view of such a broad, compulsory reference power rests upon the right of parties to have their dispute adjudicated upon by courts rather than private umpires. Such concerns are by no means new; in the 1877 case of Longman v East[32], for instance, Lord Justice Cotton said that:

I have no hesitation in saying that in my opinion it seems to me that, except under very special circumstances, the parties should not be deprived of their right of having their cases, if they desire it, adjudicated upon before the ordinary tribunals and in the ordinary way.

48 Some one hundred years later upon the promulgation of Pt 72, this concern regarding the potential for compulsory references- over and above the objection of the parties- to undermine the right of access to the courts was echoed by the New South Wales Bar Association. In the Association's Bar Notes, it concluded that:

[t]he fundamental point of the Bar's opposition to this rule lies in the principle that, absent any binding contractual constraints, a citizen is entitled to have his disputes determined in and by the courts of the land in accordance with law.[33]

49 In the event, however, subsequent interpretations of Pt 72 have overwhelmingly favoured the former, efficiency based view of references over the latter, principled approach. Thus, contrary to the position in other Australian jurisdictions[34], it is established in New South Wales that the Court has no predisposition to making or refusing an order for reference depending on the wishes of the parties. For Justice Smart in Park Rail Developments Pty Ltd v RJ Pearce Associates Pty Ltd & Ors[35], the rationale for this position is that "[t]here has been a change in the attitude of the courts as to the value of arbitrations and references and the desirability of people of suitable standing, experience and qualifications dealing with, inter alia, technical matters and contract administration." Again particularly in the construction context, the potential time and cost advantages of reference proceedings are critical as:

Many contractors, sub-contractors and small consultants have limited financial resources and need the money claimed to survive financially or to carry on and develop their business in the normal way. As arbitrations and references usually take place promptly the parties are not encumbered with the costs of proceedings extending over several years awaiting a hearing. Because of the technical knowledge of the arbitrators or referees, the hearing may be quicker.

Indeed to defer to the views of the parties as to the suitability of the proceedings (or a question therein) to reference would emasculate the ability of the Court to use Pt 72 as a means of circumventing the strategic prolonging of litigation as a means of running down the resources of the other side.

50 Similarly in Super Pty Ltd (formerly known as Leda Constructions Pty Ltd) v SJP Formwork (Aust) Pty Ltd[36], Chief Justice Gleeson held that a party dissatisfied with a referee's report is not entitled to a de novo hearing of issues of fact or law on an application to the Court for it to exercise its discretion to vary, adopt of set aside the report.[37]

51 It is submitted that, while the perspective of those concerned with the ex facie potential for Pt 72 to derogate from the fundamental right of access to the courts is understandable, the existence of a broad reference power and the approaches to consent and adoption propounded in New South Wales are entirely correct. Certainly the power is broad, but it is tempered by the fact that the Court at all times retains a supervisory power to control the conduct of the reference. As per Pt 72 r 5, the Court may "at any time and from time to time ... give such instructions as the Court thinks fit relating to the inquiry or report." But more fundamentally, the breadth of Pt 72 permits the Court to adapt the terms of the reference- if indeed one is required- to fit the particular circumstances of the dispute; a consideration which, certainly in the construction context, is all-important.

52 Before moving on, however, I would like to note from my experience that such benefits of reference proceedings are almost entirely contingent on a prudent choice of referee. Too often in the List one sees applications to set aside a referee's determination upheld due to the fact that a proceeding involving a substantial question of law, as well as significant technical issues, was referred to an

umpire skilled only in the latter aspect of the dispute. Invariably errors of law are made, and the parties must then endure the expense of a further reference or, alternatively, the matter proceeding to a curial hearing. Of course, the obverse is true in instances where a purely legal expert is appointed.

53 Accordingly it is my opinion that the decision to refer the whole of the proceedings out to reference must be carefully considered; in many circumstances, it may well be preferable to formulate certain discrete technical issues to be subject to report, leaving residual questions of law for adjudication in the ordinary course. Alternatively, the power of the Court contained in Pt 72 r 4 to appoint two or more referees might be considered, allowing for a mixed panel of technical and legal specialists. Whatever course is chosen, it must be continually kept in mind that to incur the cost of an abortive reference due to carelessness at the formative stages of the process is to undermine the whole purpose of the mechanism.

The 'Overriding Purpose' of the Supreme Court Rules

54 Finally in respect of existing case management procedures I would like to draw your attention to the 'overriding purpose' of the New South Wales Supreme Court Rules in their application to civil proceedings, expressed in r 3 to be the facilitation of the "just, quick and cheap resolution of the real issues in the proceedings." That rule further provides that the Court must "seek to give effect to the overriding purpose when it exercises any power given to it by the rules or when interpreting any rule", that parties are under a duty to assist the Court in furthering the overriding objective and that any failure to do so may be taken into account when the Court is exercising its discretion as to costs.

55 The particular importance of the overriding objective in the fast-track environment of the Commercial and Technology and Construction Lists is further reinforced by paragraph 13 of Practice Note 100, which dictates that at the first directions hearing the nature of the orders the Court will make are dependent on what will best further the just, quick and cheap disposal of the proceedings.

56 Introduced in 2000, the provenance of the overriding purpose rule is the finding of the 1996 Woolf Report that "[c]ivil procedure involves more judgment and knowledge than the rules can directly express"[38]; the notion that rules of court are by no means a procedural code, but rather a means of guiding the court in the exercise of its inherent and statutory power to control its own processes (and, obversely, indicating to parties how that discretion is likely to be exercised). Accordingly, the existence of an overriding purpose is by no means a mere aspirational statement. Rather, expressed as it is in obligatory terms ('the Court must seek to give effect'), it has the potential to effect substantially the manner in which the Rules are interpreted, administered and applied.

57 Thus in Idoport Pty Ltd & Anor v National Australia Bank & Ors,[39] a massive commercial litigation in which the defendant bank was sued for an amount in excess of $50 billion in respect of its purchase and implementation of an electronic share trading system, it was proposed by the plaintiffs, but resisted by the defendants, to hear the matter in a 'Technology Court.' In general terms, the use of that facility would entail the provision of evidence via video link, an electronic document management network and internet access to documents from the Bench and Bar table.

58 Relying on the overriding purpose rule, Justice Einstein ordered that the proceedings were to be conducted via the Technology Court notwithstanding the opposition of the defendant. The headnote to His Honour's reasons illustrates both the logic of that decision and its relevance to the present discussion, being that:

The inherent jurisdiction of the Court to regulate its own proceedings so as to promote matters relating to convenience, expedition and efficiency in the administration of justice, includes directing or ordering the parties to use certain procedures, if the benefits derived from the use of such procedures justify the costs and will ensure that the trial proceeds quickly and efficiently.

59 That is to say, the utility of the array of procedural devices which I have discussed today in securing the more efficient management of construction disputes is virtually set at naught unless the court has both the power and the obligation to apply its own view as to the most appropriate course of action in any given matter. As I noted at the outset, protracted and strategic litigation remains an unfortunate feature of construction disputes in New South Wales such that the power of the Court to urge- or if necessary compel- the parties to adopt a particular procedure is crucial.

60 From this perspective it can then be submitted that the logical first step in any move towards national unification in this area involves the instigation of attitudinal change in parties, practitioners

and the judiciary alike. It requires to move away from assumptions that parties will be able to delay, obfuscate or engage in excessive strategic manoeuvring without incurring the court's opprobrium; equally, it is necessary for practitioners and judicial officers to overcome deeply entrenched suspicions concerning the value of court-annexed ADR mechanisms such as mediation or references out. As I mentioned above, we already have the many of the necessary procedural devices available to more effectively manage construction disputes. What is required is specific direction as to how such devices will be utilised, and it is submitted that a statement in the nature of an overriding purpose, obliging all concerned to further the goal of efficiency, is capable of going at least some of the way to achieving that goal.

Proportionality of Costs and the Proposed Uniform Civil Procedure Rules

61 The proposed New South Wales Uniform Civil Procedure Rules are to be included in a Schedule to a Bill, presently styled the Civil Procedure Bill 2004. It is the intention of the drafters to amalgamate common procedural features of the Local, District and Supreme Courts for the sake of clarity and consistency, while resisting any dramatic changes in substance.[40]

62 Nonetheless one of the few substantive reforms to be effected by the new procedural framework is found in proposed s 61 of the Bill- headed 'proportionality of costs'- and is to the following effect:

In any proceedings, the practices and procedures of the court should be administered in accordance with the principle that the issues between the parties should be resolved in such a way that the costs to the parties are proportionate to the importance and complexity of the subject-matter in dispute.

Given the breadth of this provision, it appears likely that, if enacted, it will have a definite impact on both the manner in which the Court manages proceedings generally and that in which it exercises its general discretion as to costs. Such an analysis is consistent with the twin concepts of "proportionate procedures" and "proportionate costs"[41], introduced into the United Kingdom Civil Procedure Rules following the Woolf Report and upon which the proposed s 61 of the New South Wales uniform rules is based.

63 A useful starting point in an examination of this concept of proportionality is the overriding purpose of the United Kingdom Civil Procedure Rules, which sets out the principle of 'proportionate procedures' in obliging the Court to deal with matters before it "in ways which are proportionate-

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party.[42]

In turn the substance of the principle of proportionate procedures is found in, amongst other things, the various case management paths introduced by the Civil Procedure Rules and the procedural sanctions which may accompany their breach. Essentially, therefore, the concept of proportionate procedures (whether pursuant to the proposed New South Wales s 61 of the United Kingdom Rules) is concerned with designing and applying court structures capable of dealing with cases such that their disposal is commensurate with the issues in dispute.[43]

64 This is all very familiar. For instance, a procedurally proportionate resolution to a building dispute concerning very specific technical issues as to the structural soundness of, say, a supporting wall might be to refer the question to a referee rather than have the parties incur the expense of litigating the matter before a lay judge. Rather, it is the concept of 'proportionate costs' which is truly novel to existing New South Wales and Australian procedural law, introducing as it does considerations of efficiency into an area traditionally concerned only with questions of reasonableness. Properly implemented, it is submitted that proportionality of costs potentially represents another (albeit ex post facto) device the court's utilisation of which could provide an incentive to parties, of their own motion, to adopt the most cost and time effective means of isolating and resolving the real issues in dispute between them.

65 In his final Access to Justice report, Lord Woolf explained the rationale of introducing an element of proportionality to the area of costs as follows:

The function of taxation is not to undertake an independent assessment of the charges claimed as a whole but to resolve disputes over items between the paying and receiving party. The process therefore depends on the paying party identifying those items on the bill which are capable of being challenged effectively. The taxing officer or Master does not give his opinion of the reasonableness of the bill as a whole. Thus there is no objective assessment of what would have been a reasonable sum for conducting a particular case; instead, it is a retrospective check on the reasonableness of the costs in fact incurred by a party over the course of the litigation. As long as a party, judged by the conventions of current practice, was acting reasonably in the way in which he conducted the case and charges for the actual work done were reasonable in the circumstances, the taxing process does not intervene. The taxing system is therefore not a method of controlling costs absolutely but a safeguard against claims for costs which can be shown to be out of line with the norm. Taxation provides no encouragement to litigants to conduct litigation in the most economical manner.[44]

Alternatively expressed, so long as reasonableness remains the sole criterion upon which cost awards are assessed then the area will continue to remain an anachronism in a vastly changed procedural environment. The common thread of all the various dispute resolution mechanisms at the disposal of the court which I have discussed today- mediation, arbitration, references and the like- is that the court now has power to direct the parties to undertake a particular course of action, regardless of their views on the matter, when to do so is in the interests of the efficient conduct of the litigation. In contrast, the present manner in which costs are assessed dos not provide for the court to inject or, when necessary, impose its opinion as to the appropriateness of the parties' conduct.

66 This idea was expressed in one of the many issues papers accompanying Lord Woolf's report as follows:

The failure of the present system to curb costs is due to two factors. First, costs are determined by reference to what is considered by the profession to be reasonably necessary work and by the prevailing standards of hourly fees and overheads. In other words, the judicial pitching of costs follows the forensic practices and expectations and not the other way round. Secondly, taxation is conducted retrospectively so that it reflects the way in which the parties choose to conduct the case. In other words, retrospective taxation does not influence the steps which are pursued in litigation.[45]

67 To this end the new Civil Procedure Rules based upon Lord Woolf's findings, while retaining the general rule that costs should follow the event, contained the following rule 44.5, to be applied when the court is exercising its discretion as to costs:

(1) The court is to have regard to all the circumstances in deciding whether the costs were-

(a) if it is assessing costs on the standard basis [ie, a party/party basis]-

(i) proportionately and reasonably incurred; or

(ii) were proportionate or reasonable in amount.

In effect, therefore, rule 44.5 permits the Court (or taxing officer or Master) to look not only to each individual item on the bill in assessing costs, but also at the bill as whole so as to determine whether, at that general level, the total amount of costs charged is proportionate to the amount of money at stake, the importance and complexity of the case and the financial position of the parties. This conclusion is confirmed by rule 48.3(2), which provides that "[w]here the amount of costs is to be assessed on the standard basis, the court will ... only allow costs which are proportionate to the matters in issue."

68 Clearly, therefore, this new power requires- at the risk of an adverse costs order- parties and their legal representatives to consider before commencement the most appropriate and efficient method of proceeding, in light of the matter's importance and complexity. In Jefferson v National Freight Carriers Plc[46], a case in which a bill for some £7000 was handed up in a matter settled for £2275, Lord Chief Justice Woolf endorsed the following (unreferenced) passage from a County Court judgment:

In modern litigation, with the emphasis on proportionality, it is necessary for parties to make an assessment at the outset of the likely value of the claim and its importance and complexity, and then to plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time which would be necessary and appropriate to spend on the various stages in bringing the

action to trial, and the likely overall cost.

This is not to say, however, that an examination of the reasonableness of each item on the bill has no role to play or that the court is permitted to make a capricious lump sum judgment as to the appropriate measure of costs whenever a bill appears to be in excess of a 'proportionate' rate. Rather, in Home Office v Lownds[47] the Court of Appeal explained that the Civil Procedure Rules require a two-stage test to be applied to the process of assessment. First, the assessor examines the bill at a "global" level to determine whether the total sum claimed is disproportionate in the relevant sense; if not, then "all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable." But if the bill is indeed disproportionate, then second stage requires the court to determine whether "the work in relation to each item was necessary and, if necessary, that the cost of each item is reasonable." That is to say, it is only if the total sum claimed is disproportionate that each reasonably incurred and costed item will not be allowed.

69 Clearly, then, the concept of costs proportionality under the Civil Procedure Rules does effect a significant departure from the traditional common law approach to cost shifting. Equally, it must be conceded that the scope of the proposed s 61 of the New South Wales Civil Procedure Bill falls short of the reforms implemented in the United Kingdom. On its face, s 61 will presumably be capable of influencing the court in the exercise of its general discretion as to the nature of any costs order to be made; for instance, the issue of proportionality might impact upon the costs order to be made resultant upon a successful application which was extremely time consuming in respect to minor matters. Proportionality can also be the basis for the court requiring the use of a particular form of dispute resolution where there will be cost advantages.

70 What the proposed New South Wales reforms do not do, however, is inject the concept of proportionality into the process of assessment itself. Proposed s 91(1) of the Civil Procedure Bill dictates, consistent with the present s 76 of the Supreme Court Act, that costs are ordinarily to be assessed in accordance with Division 6 of Part 11 of the Legal Profession Act 1987 (NSW). In turn, s 208F of that Act provides that the principal consideration to be taken into account on the assessment of a bill of costs is "whether or not it was reasonable to carry out the work to which the costs relate."

71 Nevertheless it is submitted that the adoption of an approach to the assessment of costs which travels beyond mere reasonableness is a matter warranting further investigation in Australia. Bringing the issue back to the construction context, I emphasised at the outset my view that the key to the effective management of construction disputes is the availability to the court of a range of procedural devices capable of effecting, where applicable, time and cost savings potentially forgone if the forensic decisions of the parties were to predominantly guide the conduct of the litigation. Additionally there is the consideration that the court requires the power to impose, again where applicable in the circumstances, such measures on the parties regardless of their consent. Thus it is more than a little incongruous that in the very area commonly identified as the principal barrier to the more efficient disposal of litigious disputes- namely costs- the court is largely bound to the judgments of the parties as to the amount of costs to be incurred. Rather, it is submitted that to provide the court with power to reach its own conclusions regarding the appropriateness of the amount of costs actually incurred would be entirely consistent with modern conceptions of managerial judging.

Conclusion

72 It is beyond doubt that construction disputes in the Supreme Court of New South Wales are already subject to an intensive degree of management and control by the Judges and Masters before which they are listed; as, I expect, is the case with other jurisdictions across Australia. In view of the particular need to control the length and cost of such disputes, it is submitted that such a high degree of Bench supervision is both necessary and desirable.

73 By way of summary, it is my view that the critical elements of the management of construction disputes are as follows:

(a) the availability of a range of different procedural devices capable of being utilised to ensure the quick, just and cheap disposal of proceedings;

(b) the court having power to direct parties to adopt a particular procedure or course of action, regardless of whether consent is procured to same;

(c) the effecting of attitudinal change on the part of parties, practitioners and judicial officers alike as to

the need to both prioritise efficiency over excessive strategic manoeuvring and embrace alternative dispute resolution mechanisms capable of assisting in the achievement of that goal; and

(d) the active use by judges of proportionality of costs to achieve the most efficient disposal of cases.

1 (1986) 3 BCL 290 at 297.
2 Construction Agency Co-ordination Committee, Construction Industry Activity Forecasts, April 2004. (www.construction.nsw.gov.au).
3 Professor Ian Scott, "Adjusting the Interests of Parties and Courts: Uniformity, Diversion and Proportionality", Keynote Address, 22nd Annual AIJA Conference, Sydney, 17-19 September 2004, page 26 (www.aija.org.au/ac04/papers.htm).
4 For a more comprehensive discussion of this Act, see: Justice R McDougall, "The Building and Construction Industry Security of Payment Act 1999", available at: www.agd.nsw.gov.au/sc/sc.nsf/pages/mcdougall_020904
5 Building and Construction Industry Security of Payment Act 1999, Pts 2 and 3.
6 Transgrid v Siemens & Anor [2004] NSWSC 87 at [56], per Macready M.
7 Building and Construction Industry Security of Payment Act 1999 ss 9, 1, 11 and 22.
8 Building and Construction Industry Security of Payment Act 1999 s 25.
9 Building and Construction Industry Security of Payment Act 1999 ss 4(b) and 32 (triggering of adjudication procedure does not preclude subsequent court proceedings) and 21 (normally, the adjudicator is to make a determination within 10 business days after accepting the claim).
10 Building and Construction Industry Security of Payment Act 1999 s 12.
11 This being the upper limit of the civil jurisdiction of the District Court of New South Wales: District Court Act 1973 (NSW) s 44(1)(a).
12 www.agd.nsw.gov.au/sc%5Csc.nsf/pages/Bergin_050504
13 Practice Note 100, par 13(3).
14 Practice Note New South Wales, Practice Note 127, par 11.
15 [2001] NSWSC 1208.
16 See: Morrow v chinadotcom Corp [2001] ANZ Conv R 341.
17 [2002] NSWSC 455 at [4].
18 UNCITRAL Model Law on International Commercial Arbitration (1985). By virtue of s 21 of the International Arbitration Act 1974 (Cth), the Model Law applies by default to all 'international arbitrations' (as defined in Art 1 of the Model Law) conducted in Australia, unless the parties otherwise provide.
19 Csarnikow v Roth Schmidt & Co (1922) 2 KB 478 at 488.
20 Commercial Arbitration Act 1984 (NSW) ss 40 and 55.
21 Abignano Ltd v Electricity Commission of New South Wales (1986) 3 BCL 290 at 297.
22 [1982] AC 724 at 737.
23 (1988) 8 BCL 300 at 308-9.
24 (1991) 26 NSWLR 184 at 189-195.
25 (1992) 26 NSWLR 203 at 222-3.
26 For a more comprehensive discussion of the history of the reference out system in the United Kingdom and New South Wales, see: Justice RD Giles, "The Supreme Court Reference Out System" (1996) 12 Building and Construction Law 85; Justice PA Bergin, "Methodology of the management of construction disputes in the Supreme Court of New South Wales", Address to the Law Council of Australia's Construction and Infrastructure Seminar, Melbourne, 5 May 2004.
27 Note, however, that both the Common Law and Chancery courts were long considered to have an inherent power to refer proceedings to arbitration: Buckley & Anor v Bennell Design & Construction Pty Ltd & Anor (1977) 140 CLR 1 at 28-9, per Jacobs J.
28 See in the rules of the various State and Territory Supreme Courts: ACT O 83 r 13; SA R 76.06; Tas r 574; Vic r 50.01; Qld UCPR rr 501-506. See also: Supreme Court Act 1979 (NT) s 25; Supreme Court Act 1935 (SA) s 67; Supreme Court Act 1935 (WA) s 50; Supreme Court Act 1995 (Qld) s 255.
29 See also: Supreme Court Act 1970 s 124(2).
30 [1980] Qd R 355 at 360.
31 (1991) 23 NSWLR 13 at 23.
32 [1877] 3 CPD 142 at 162.
33 "Arbitration Rules", Bar Notes, Summer 1985, page 4.
34 See: Honeywell Ltd v Austral Motors Holdings Ltd [1980] Qd R 355 at 359-60, per Campbell J; AT & NR Taylor & Sons Pty Ltd v Brival Pty Ltd [1982] VR 762 at 765, per Beach J; O'Brien Lovrinov Crafter Pty Ltd v Corradini [1999] SASC 159 at [30], per Martin J; Bold Park Senior Citizens Centre & Homes Inc v Bollig Abbott & Partners (Gulf) Pty Ltd & Ors (1997) 19 WAR 281 at 285, per Ipp J.
35 (1987) 8 NSWLR 123 at 126.
36 (1992) 29 NSWLR 549 at 562-563.
37 New South Wales Supreme Court Rules Pt 72 r 13.
38 Lord Woolf, Access to Justice: Final Report, HMSO, London, 1996, page 274. See also the 'overriding objective' of the United Kingdom Civil Procedure Rules, r 1.1.

39 (2000) 49 NSWLR 51.
40 For a more comprehensive overview of the project, see: Justice John P Hamilton, "The NSW Civil Procedure Bill 2004 and the Uniform Civil Procedure Rules", Speech to the 22nd AIJA Annual Conference, Sydney, 17-19 September 2004. (www.aija.org.au/ac04/papers.htm)
41 See generally: Professor Ian Scott, "Adjusting the Interests of Parties and Courts: Uniformity, Diversion and Proportionality", Keynote address to the 22nd AIJA Annual Conference, Sydney, 17-19 September 2004. (www.aija.org.au/ac04/papers.htm)
42 Civil Procedure Rules (UK) r 1.1(2)(c).
43 Scott, "Adjusting the Interests of Parties and Courts: Uniformity, Diversion and Proportionality", Keynote address to the 22nd AIJA Annual Conference, Sydney, 17-19 September 2004. (www.aija.org.au/ac04/papers.htm)
44 Woolf, Access to Justice, page 87.
45 A.A.S. Zuckerman, "Devices for Controlling the Cost of Litigation Through Costs Taxation", in Access to Justice Inquiry Issues Papers, Lord Chancellor's Department, London, January 1996.
46 [2001] 2 Costs LR 313 at [40].
47 [2002] EWCA Civ 365 at [31], per The Court (Lord Woolf CJ, Laws and Dyson LJJ).

Electronic Discovery: Overview and Challenges the Court Faces and Benefits to the Court

Introduction

In his address on February 2nd, at the Opening of Law Term Dinner, Chief Justice Spigelman emphasised the need, especially in the current economic climate, for the legal profession to control costs, stating that the profession 'is in danger of killing the goose.'[1] The Chief Justice stressed that the judiciary and the profession must 'co-operate to ensure that all of the areas in which costs can escalate unreasonably …are controlled even more strictly than we have come to do in the past.'[2] In describing the areas where co-operation is required the Chief Justice included the following:

- Focussing the issues so that extensive discovery is not required and recognising that the faint hope that a smoking gun may exist to revive a weak case is simply not worth the costs involved;
- Applying with renewed vigor the test of proportionality, expressed in s60 of the *Civil Procedure Act* 2005, to the effect that costs to the parties of dispute resolution must be proportionate to the importance and complexity of the subject matter in dispute.[3]

[1] Chief Justice Spigelman, 'Opening of Law Term Dinner Address' (Speech delivered at the Law Society of NSW Opening of Law Term Dinner, Sydney, 2 February 2009).
[2] Ibid.
[3] Ibid.

In light of this ever present need to make litigation affordable and accessible, the profession and the judiciary must turn its attention to the issue of escalating costs of discovery in this electronic age.

Discovery has frequently been signalled out as one of the most costly procedures associated with litigation.[4] It has been said that '[d]iscovery … commonly comprises half the total expense of a case',[5] and has been described by Chief Justice Doyle of the South Australian Supreme Court as a scourge for preventing the average person access to substantial civil litigation.[6] Chief Justice Spigelman has also expressed his dissatisfaction with the costs associated with discovery on another occasion when he said:

> When senior partners of a law firm tell me, as they have, that for any significant commercial dispute the flag-fall for discovery is often $2 million, the position is simply not sustainable.[7]

Electronically Stored Information

It has been estimated that over 90% of information stored by companies is only stored in electronic format.[8] Technological developments, such as email, voicemail, instant messaging, software programs, PDA's and mobile phones mean, as a e-litigation partner at a large firm recently commented, that 'the volume of potentially

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[4] Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System,* Report No 89 (2000), [6.67].
[5] Elisabeth Sexton, 'High costs of justice for companies', *Sydney Morning Herald* (Sydney), 2 June 2007, 28.
[6] See, Brad Crouch, 'Judge "gives up" on civil system', *The Adelaide Sunday Mail* (Adelaide), 2 June 2007.
[7] Chief Justice Spigelman, 'Access to Justice and Access to Lawyers' (2007) 29 *Australian Bar Review* 136.
[8] Clare Buttner, 'A new discovery' (2007) 333 *Lawyers Weekly* 28.

discoverable information is huge'.[9] The enormity of electronically stored information **(ESI)** that a corporation possesses is illustrated by looking for example at Microsoft Corporation. Microsoft receives up to 300 million external emails a month, and 90 million internal emails.[10] Further it generates 150-200 backup tapes a day, each holding 15 tetrabytes of data (with a tetrabyte having the capacity to hold up to 500 billion typed pages).[11]

Problems Posed by Electronic Discovery

The problems that this scale of ESI poses to the process of discovery was seen in the *C7* litigation. In the summary of his decision Justice Sackville commented:

> Electronic trials have many advantages, but reducing the amount of documentation produced or relied on by the parties is not one of them. The outcome of the processes of discovery and production of documents in this case was an electronic database containing 85,653 documents, comprising 589,392 pages. Ultimately, 12,849 '*documents*', comprising 115,586 pages, were admitted into evidence.[12]

Interestingly the proportion of admitted to discovered material at 15%, in this case, is quite high.

Clearly though discovery of this huge and apparently ever increasing amount of ESI poses a number of problems.

Firstly, due to the scale of documents that are electronically stored by corporations, lawyers involved in litigation involving large corporate clients face a huge job in

[9] See, Ibid.
[10] See, Georgene Vario, 'Developments in the Law Electronic Discovery' (2005) 38 *Loyola of Los Angeles Law Review* 1529, 1530-1531.
[11] Ibid.
[12] *Seven Network Limited v News Limited* [2007] FCA 1062, SUMMARY [4].

sorting through such massive amounts of information. Such a process can only increase the cost to the client. The potential costs associated with such a process are so great that there have been suggestions that some US law firms see electronic discovery as 'an opportunity to create "another profit centre"'.[13] In Australia, litigation service providers believe that the introduction of the Federal Court Practice Note 17, dealing with the use of technology in the management of discovery, will lead to an increase in business.[14] Some analysts believe that globally the spending on electronic discovery will reach $4.8 billion by 2011.[15]

Further, many practitioners feel that to deal with electronic discovery law firms will either have to acquire document management software, or use external service providers. As a result it is thought that the costs of discovery will increase and not decrease if electronic discovery is required by the courts. Larger firms appear to be more comfortable with electronic discovery, mainly as they have IT specialists, and legal staff who are experienced with the protocols and programs that are used in electronic discoveries. However, smaller firms that do not have the resources and software to manage electronic discovery, are more resistant to the process. This is mainly due to the costs associated with engaging an external service provider or acquiring the software and training to deal with electronic discovery internally.

There are also risks associated with searching through such a huge number of documents. Partners at large Australian law firms have expressed concerns with the difficulties 'in wading through the masses of data' to find the 'relevant content, and not miss that "smoking gun".'[16] Some may suggest that keyword searching, a main

[13] See, Kate Gibbs, 'Needle in a data haystack' (2008) 404 *Lawyers Weekly* 24.
[14] Angela Priestley, 'eDiscovery means business, big business' (2008) 396 *Lawyers Weekly* 22.
[15] See, Ibid.
[16] See, Gibbs, above n 13.

advantage of having documents in electronic form, would help to solve such a problem. However, such searches are seen by many merely as tools which only 'scratch the surface' and not as a guarantee that all relevant documents will be found.[17] Practitioners are also concerned that loss of privilege is more likely to occur where electronic discovery is involved.

A further difficulty encountered with ESI is that to extract the relevant information often requires special computer forensic techniques. Electronically stored information is changeable, and can easily be altered. This means that often discovery will involve taking a copy of a computer's hard disc, and 'every single piece of information on it'.[18] This allows computer forensics expert to reconstruct deleted material, allowing for the discovery of altered, 'destroyed' or forged material.[19] Again this is a process that can only lead to increased costs to clients.

Such forensic examination leads to IT experts playing an even greater role in the discovery process. Practitioners have expressed concerns at contracting such work out to third parties, as lawyers owe a non delegable duty to ensure that 'all relevant documents to the dispute have been produced.'[20] There are doubts that experts will have a sufficient understanding of the law to ensure that all the relevant information has been extracted.[21] Again, this issue poses a greater problem for smaller firms, who unlike the large firms will not have the resources to manage electronic discovery internally, and thus will be forced to outsource the work. The failure to properly

[17] Ibid.
[18] Craig Macaulay, Blare Sutton and David Wishart, 'Email age strains the law' (2006) 3 *Australian Law Management Journal* 12, 12.
[19] Ibid.
[20] See Gibbs, above n 13.
[21] Ibid.

exercise this obligation can have adverse affects on the lawyer as the result in the case of *Qualcomm v Broadcom*[22] shows.

A recent decision in the NSW Supreme Court, *NAK Australia Pty Ltd v Starkey Consulting Pty Ltd,*[23] illustrates how the changeable nature of ESI can lead to dispute. In this case, the plaintiff relied on an email sent by the defendant to make out its case. The defendant disputed the authenticity of the copy of the email that the plaintiff relied upon and alleged that it had been tampered with. The plaintiff also wished to put into evidence a CD-ROM that was said to contain a "snapshot" of the computer the defendant had used, as at 27 June 2007. The defendant contended that the "snapshot" was incomplete and did not reflect the whole of the contents of his computer.

The defendant thus sought an order that the plaintiff provide them with access to the computer, to verify that the "snapshot" was accurate, and to obtain information and evidence from the computer. Justice Brereton found that discovery should be extended to the contents of the computer. The defendant was thus granted access to the computer for the purpose of accessing the email account to attempt to establish whether the email was authentic, and to verify that the "snapshot" was accurate. This perhaps illustrates the use that can be made of the available technology when a real issue emerges. This is in contrast to the usual problem, which is the large ambit claim for discovery.

Another problem that lawyers feel they are confronted with is that they will need to familiarise themselves with their client's information retention policies and

[22] *Qualcomm Incorporated v Broadcom Corporation,*(U.S.D.C, 05cv1958-B (BLM)).
[23] *NAK Australia Pty Ltd v Starkey Consulting Pty Ltd* [2008] NSWSC 1142.

procedures to prevent the destruction of discoverable information. Again this would seem to be a costly task. One practitioner commented on the scope of the obligation, '[c]orporate lawyers need to proactively manage their electronic information. They need to have appropriate information management systems in place…They need to be able to quickly suspend the deletion of all relevant information, however stored.'[24]

Destruction of Evidence as a Criminal Offence

Recently enacted Victorian legislation highlights a final problem facing lawyers and their clients with electronic discovery. In response to *McCabe v British American Tobacco Australia Services Ltd,*[25] the Victorian Parliament passed the *Crimes Documet Destruction) Act* 2005 (Vic) and the *Crimes (Document Destruction) Act* 2006 (Vic).[26] This legislation introduces a new division dealing with the destruction of evidence into the *Crimes Act* 1958 (Vic) (**the Act**). The Commonwealth and most States and Territories have legislative provision making it a crime to suppress, conceal destroy, or alter evidence where there is either, an intent to mislead or influence judicial proceedings,[27] or an intent to stop such evidence from being used.[28] However, the Victorian legislation is the most detailed and strict of any jurisdiction.

Section 254 of the Act makes it an offence, punishable by up to 5 years imprisonment, for a person who knows that a document or other thing of any kind is or is reasonably likely to be required in evidence in a legal proceeding, to either:

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[24] See, Buttner, above n 8.
[25] *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73.
[26] See, Suzanne Le Mire, 'Document destruction and corporate culture: A Victorian initiative' (2006) 19 *Australian Journal of Corporate Law* 304, 308.
[27] See, s 317 *Crimes Act* 1900 (NSW), s 243 *Criminal Law Consolidation Act* 1935 (SA), s 268.104 Commonwealth Criminal Code, and s 99 Criminal Code Act 1924 (Tas).
[28] See, s 129 *Criminal Code* 1899 (Qld), s 132 *Criminal Code Act* 1913 (WA), s 102 Criminal Code (NT), and s 39 *Crimes Act* 1914 (Cth).

(a) destroy such a thing; or

(b) authorise or permit another person to destroy such a thing, with the intention of preventing the document being used in legal proceedings.

The section applies to legal proceedings that are in progress, or those that are to be, or may be commenced in the future.[29] Further, section 255 deals specifically with corporate criminal responsibility for an offence under s 254.

Some argue that this poses a particular problem in terms of electronic discovery, due to the ease with which electronic documents can be unintentionally altered, and the need for the routine deletion of some ESI. One litigation service provided put the problem as follows:

> [I]n stark contrast to the traditional tactile paper-based world, where once a document is created it remains in essentially the same state until it is intentionally destroyed, in the electronic data realm data and documents are dynamic.[30]

It appears though that only the Victorian legislation will pose a problem for the inadvertent destruction or alteration of electronically stored documents. This is because where an individual actually 'destroys, conceals or renders illegible, undecipherable or incapable of identification' evidence, as long as they have knowledge that the document is of a kind that will, or is reasonably likely to be required as evidence in legal proceedings, they will be guilty of an offence. However, offences relating to the destruction of documents in other parts of Australia all

[29] s254(2) *Crimes Act* 1958 (Vic)
[30] Craig Macaulay and Blare Sutton, 'Laying down the data law' (2007) 3 *Australian Law Management Journal* 28.

require that in altering or destroying evidence, there is an intention to mislead a judicial tribunal, or stop the evidence being used in proceedings. Such a requirement of intention would not appear to be satisfied where ESI is inadvertently altered (by for example simply opening the document) or destroyed by routine operations.

Managing Electronic Discovery

The problems associated with electronic discovery will not disappear, as ESI is likely only to increase in magnitude. Thus the profession and the judiciary should look to ways to most effectively manage the issues that arise with electronic discovery.

In the remainder of this speech I will briefly look at some suggestions that practitioners have made as to how electronic discovery should be dealt with. I will then discuss with how the US Federal Court has attempted to deal with some of the problems associated with electronic discovery mentioned above. Finally I will look measures that the NSW Supreme Court has taken, and some of the Australian case law that surrounds the issue.

Practitioner's Views

The Victorian Law Reform Commission's Civil Justice Review[31] offers some guidance as to the attitude of the legal profession towards the way in which electronic discovery issues should be dealt with. One submissions made to the Commission suggested that large-scale discovery would be aided by 'the establishment of specialist management lists, and that practitioners in that list be accredited in electronic discovery.[32] However, Telstra, and the Australian Corporate Lawyers Association, objected to a requirement of accreditation, suggesting that

[31] Victorian Law Reform Commission, *Civil Justice Review,* Report No 14(2008).
[32] Ibid, 479.

practitioners would develop an expertise in the area through experience.[33] <e.law> Australia suggested in its submission to the Commission that a standard for the preparation and exchange of electronic material for discovery be developed.[34]

The call for a standard is reminiscent of the effort that went into producing the suggested guidelines for the use of technology by Courts by the AIJA in 1999[35] and 2001.[36] Those guidelines were an attempt to suggest a national model to be adopted throughout Australia by the state courts. Although some states did adopt them in their practice notes which were issued, the practice notes started to vary over the years as individual Courts addressed problems which they saw occurring in that state. Hence the variety of different approaches now taken in the various jurisdictions.

It also appears from comments made by legal practitioners to this court on why electronic discovery is not more widely used, that large firms with Legal Technology teams, who have the resources and expertise to manage electronic discovery internally are comfortable with the process. One such practitioner has said in discussing the matter with the Court, 'we use electronic discovery wherever possible…I am surprised that others are not doing so'. It was also clear from such discussions that smaller firms were not as comfortable with e-discovery.

The US Approach to Regulating Electronic Discovery

The US Federal Rules of Civil Procedure (**FRCP**) were significantly amended in 2006 to deal with some of the issues and difficulties that discovery of ESI had

[33] Ibid.
[34] Ibid.
[35] The Australian Institute of Judicial Administration, *Technology for Justice Report,* Report No 53 (1999).
[36] The Australian Institute of Judicial Administration, *Technology for Justice 2000 Report,* Report No 59 (2001).

presented. The *Zubulake v USB Warburg LLC*[37] proceedings, which concerned the recovery of emails from backup tapes, and the permanent deletion of emails relevant to the proceedings by USB, is an example of a case where a number of difficulties concerning the discovery of ESI were encountered. In these proceedings, issues arose as to who was required to pay the costs of restoring backup data to be discovered, and the obligations on both litigants and their legal representatives to ensure that ESI has been preserved.[38]

Firstly, in respect of who should bear the costs of restoring backup data it was held that the costs of discovery should only be shifted from the producing party to the requesting party where the data requested was inaccessible. Where data is considered inaccessible the court will apply a seven-factor test to determine whether costs should be shifted. These factors are:

1. the extent to which the request is to discover relevant information;
2. the availability of information from other sources;
3. the cost of production compared with the sum in dispute;
4. the cost of production compared with the resources of the parties;
5. the ability and incentives for each party to control costs;
6. the importance of the issues at stake in the litigation; and
7. the benefits in obtaining the information.[39]

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[37] *Zubulake v USB Warburg LLC* 217 F.R.D. 309 (S.D.N.Y. 2003), *Zubulake v USB Warburg LLC* 216 F.R.D 280 (S.D.N.Y. 2003), *Zubulake v USB Warburg LLC* 220 F.D.R. 212 (S.D.N.Y. 2003), *Zubulake v USB Warburg LLC* 229 F.R.D 422 (S.D.N.Y July 20, 2004).

[38] See, Michael Legg and Jennifer Thomas, 'New discovery rules in the US for electronically stored information' (2006) 44(7) *Law Society Journal* 79.

[39] See, Jessica Lynn Repa, 'Adjudicating beyond the scope of ordinary business: Why the inaccessibility test in Zubulake unduly stifles cost-shifting during electronic discovery' (2004) 54 *American University Law Review* 257, 274; *Zubulake v USB Warburg LLC* 217 F.R.D. 309 (S.D.N.Y. 2003).

In this case USB was ordered to bear most of the costs of restoring the information on backup tapes, as Zubulake was able to demonstrate that the tapes were likely to contain relevant information, and USB had failed to maintain all relevant information in its active files.[40]

Secondly, it was held in respect or a litigant's duty to preserve ESI, that:

> [o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litgation hold" to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes, which may continue to be recycled (e.g. those typically maintained solely for the purpose of disaster recovery). On the other hand, if backup tapes are accessible (i.e. actively used for information retrieval), then such tapes would likely be the subject to the litigation hold.[41]

Finally, it was held that there a number of duties on a litigant's counsel in relation to the retention of ESI. It was held that a party's counsel have a duty to:

1. oversee the "litigation hold" and monitor their client's efforts to retain relevant information;[42]
2. become 'fully familiar with her client's document retention policies, as well as the client retention architecture'; [43] and
3. retain all information identified as relevant, and produce it in response to an opposing party's request.[44]

[40] See, *Zubulake v USB Warburg LLC* 216 F.R.D 280 (S.D.N.Y. 2003).
[41] *Zubulake v USB Warburg LLC* 220 F.D.R. 212 (S.D.N.Y. 2003), 218.
[42] *Zubulake v USB Warburg LLC* 229 F.R.D 422 (S.D.N.Y July 20, 2004), 432.
[43] Ibid.
[44] Ibid.

A number of provisions were introduced into the FRCP to require parties to investigate and address issues regarding electronic discovery early in the proceedings. Firstly, scheduling orders issued by a Federal Court may now 'provide for the disclosure or discovery of electronic stored information' and 'include any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after information is produced.'[45] Further, a party's initial disclosures must 'include a copy, or a description …of all … electronically stored information, … that the disclosing party has in its possession…that support its claims or defenses'.[46] Finally, during the initial conference the parties must attempt to agree on a discovery plan, which must state any 'issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced'.[47]

Further amendments provide that a party need not provide discovery of ESI from sources that are not reasonably accessible due to undue burden or cost, unless the requesting party can show good cause.[48] In a case where a party shows good cause for the discovery of such information the court may specify conditions for the discovery.[49] Information that may not be reasonably accessible includes, 'legacy data that remains from obsolete systems which is unintelligible on the successor systems, and data that was deleted but remains in fragmented form, requiring a modern version of forensics to restore and retrieve it'.[50]

[45] See, rule 16(b)(3)(B) of the FRCP.
[46] Rule 26(a)(1)(A)(ii) of the FRCP.
[47] Rule 26(f)(2) of the FRCP.
[48] Rule 26(b)(2)(B) of the FRCP.
[49] Ibid.
[50] See, Legg, above n 38.

The new provisions also provide protection of privilege of inadvertently produced privileged documents. The rules provide that if information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, such material must be returned, sequestered or destroyed.[51] Alternatively, the party who has received the information may present the information to the court for determination of the privilege claim.[52] This revision attempts to deal with the difficulty of reviewing the huge amounts of ESI for privilege, and the costs that can be associated with such a process. The rules as introduced do not deal with the question of waiver of privilege. As this is governed by the general law there is a real prospect that in the case of inadvertent disclosure privilege will be lost. The provisions have been described as:

> It is a nod to the pressures of litigating with the amount and nature of electronically stored information available in the present age, a procedural device for addressing the increasingly costly and time-consuming efforts to reduce the number of inevitable blunders.[53]

The problem of the inadvertent production of privileged ESI has arisen in the Australian context, and was dealt with in *GT Corporation Pty Ltd v Amare Safety Pty Ltd,*[54] which I will discuss later.

The FCPR now also specifically provide that a party may serve on any other party a request to produce any ESI,[55] and regulate the form in which such information should be provided. A request for ESI may specify the form or forms in which the ESI

[51] Rule 26(b)(5)(B) of the FRCP.
[52] Ibid.
[53] See, Legg, above n 38, quoting the Judicial Conference Committee.
[54] *GT Corporation Pty Ltd v Amare Safety Pty Ltd* [2007] VSC 123.
[55] Rule 34(a)(1)(A) of the FRCP.

is to be produced.[56] In responding to such a request a party may object to the form for producing the ESI, and specify the form which it intends to use.[57] Where no form is specified the ESI must be produced in a form in which it is ordinarily maintained, or in a reasonably usable form.[58] Such provisions clearly attempt to ensure that parties exchange ESI in a form that is usable.

Finally the FRCP set out sanctions for failure to make disclosures or cooperate in discovery.[59] Under the rules, where there is a failure to comply with an order for discovery the court may impose a number of sanctions.[60] However, absent exceptional circumstances, where there is a failure to provide ESI lost as a result of routine good-faith operation of an electronic information system, a court may not impose sanctions.[61] This, in part, helps deal with problems that lawyers face in regulating clients document retention policies.

The NSW Supreme Court and Electronic Discovery

Electronic discovery in the NSW Supreme Court is regulated primarily through two practice notes; 'Practice Note SC Gen 7 – Use of Technology' (**Practice Note 7**), and 'Practice Note No. Eq 3 – Supreme Court Equity Division – Commercial List and Technology and Construction List' (**Commercial List Practice Note**).

Practice Note 7 sets out a protocol for the use of technology in relation to civil litigation.[62] It sets out that where parties have discoverable ESI, discovery and production of this information be given electronically to avoid the need to convert it to

[56] Rule 34 (b)(1)(C) of the FRCP.
[57] Rule 34(b)(2)(D) of the FRCP.
[58] Rule 34(b)(2)(E) of the FRCP.
[59] Rule 37 of the FRCP.
[60] See rule 37(b) of the FRCP.
[61] Rule 37(e) of the FRCP.
[62] Practice Note No. SC Gen 7, para 4.

paper form.[63] Further, it sets out that where the parties have more than 500 documents that are not ESI, as a general rule the Court will expect the parties to consider the use of technology to discover and inspect such documents along with any ESI.[64] It also sets out that where there is a substantial amount of ESI the parties should consider producing the material in its searchable native form, rather than as document images.[65]

The Commercial List Practice Note, which applies only to proceedings in the Commercial List or the Technology and Construction List in the Equity Division,[66] was recently amended, with the changes commencing operation from 1 January 2009. The practice note at paragraph 28 previously read:

> Subject to an order of the Court or unless otherwise agreed between the parties, discovery is to be made electronically

The effect of this paragraph was that where documents were in paper form, parties were scanning them into electronic databases, leading to double handling of the documents. One practitioner commented to the Court that the disadvantage of copying all discovered documents electronically is that it can be very expensive (particularly if the documents are copied so that they are "word searchable") and time consuming.

The paragraph was amended to read as follows:

> Subject to an order of the Court or unless otherwise agreed between the parties, discovery of electronically stored documents and information is to

[63] Practice Note No. SC Gen 7, para 10.
[64] Practice Note No. SC Gen 7, para 11.
[65] Practice Note No. SC Gen 7, para 13.
[66] Practice Note No. SC Eq 3, para 2.

> be made electronically. Discoverable documents and information that are not stored electronically should only be discovered electronically if it is more cost effective to do so.

In a similar way to the FRCP, both Practice Note 7 and the Commercial List Practice Note require that practitioners advise their opponents at an early stage of the proceedings of potentially discoverable ESI, and meet to agree upon a number of matters.[67] Such matters include the format of the electronic database for electronic discovery, the protocol to be used for the electronic discovery, and whether the information is discovered on an agreed or without prejudice basis.[68]

The Commercial List Practice Note provides that at any hearing relating to discovery the Court expects practitioners to have, given notice to their opponents of any problems reasonably expected to arise in connection with the discovery of ESI, including difficulty in the recovery of deleted or lost data.[69] It also sets out that the Court expects that practitioners have given consideration to and conferred in relation to the particular issues involved in the collection retention and protection of ESI, including whether particular software or other supporting resources are required to access the ESI, the manner in which the documents are to be electronically formatted so that the integrity of the documents is protected, and how privileged documents should be appropriately protected.[70] It is clear from this brief discussion of both practice notes that they aim to resolve many of the issues that may be encountered in electronic discovery by encouraging the parties to meet and agree upon way in which they will deal with the discovery of ESI.

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[67] Practice Note No. SC Eq 3, para 29; Practice Note No. SC Gen 7, para 12.
[68] Practice Note No. SC Eq 3, para 29; Practice Note No. SC Gen 7, para 12.
[69] Practice Note No. SC Eq 3, 30.3.
[70] Practice Note No. SC Eq 3, 30.4.

There is one area to which I will refer. That is the requirement under Practice Note 7[71] that the parties address the following:

> Practitioners must advise their opponents at an early stage of the proceedings of potentially discoverable electronically stored information and meet to agree upon matters including:
>
> …
>
> - whether electronically stored information is to be discovered on an agreed without prejudice basis
> - without the need to go through the information in detail to categorise it into privileged and non-privileged information and
> - without prejudice to an entitlement to subsequently claim privilege over any information that has been discovered and is claimed to be privileged under s 118 and/or s119 of the Evidence Act 1995 and/or at common law.[72]

As it plain from the terms of the practice note there was a deliberate decision to restrict this question of privilege to agreement having been reached between the parties. The reason for that is twofold.

In the existing state of law unless there is agreement between the parties any disclosure is likely to give rise to questions of a waiver, either under section 122 of the *Evidence Act* 1995 or at common law. Because of this, and the fact that the legislation did not support this procedure on a non consensual basis it has been expressly limited to a consensual basis under the practice notes.

[71] Note paragraph 29 of the Commercial List Practice Note makes similar provisions.
[72] Practice Note No. SC Gen 7, para 12

The second reason is more fundamental and concerns the debate as to the propriety of having such a system. The philosophical basis of that opposition is of course that once something is disclosed it is almost impossible for the other side to put it out of the mind in terms of either the preparation or the running of the case. This problem emerged quite clearly in the case of *GT Corporation Pty Ltd v Amare Safety Pty Ltd.*[73]

The case concerned an inadvertent disclosure by the defendant in the process of discovery of electronic copies certain documents, over which they sought to claim legal professional privilege. The plaintiff lawyers subsequently looked at some of those documents, and referred to a number of them correspondence between solicitors. Her Honour dealt with the question of inadvertent disclosure of material and noted that in *Guinness Peat Ltd v Fitzroy Robinson*,[74] the Court of Appeal in the United Kingdom held that a mere plea of inadvertence does not by itself necessarily enable a party to litigation to avoid a loss of privilege. Privilege may be lost by inadvertence.

Her Honour then went on to consider the jurisdiction which can be exercised in cases where the receiving party realised on inspection he or she had been permitted to see a confidential document only because of an obvious mistake**.** Her Honour then considered the cases where the Court in the exercise of that jurisdiction can make orders preventing a lawyer from acting in order that justice not only be done but be seen to be done. The test in such a case is whether,

[73] *GT Corporation Pty Ltd v Amare Safety Pty Ltd* [2007] VSC 123.
[74] *Guinness Peat Ltd v Fitzroy Robinson*, [1987] 2 All ER 716.

> a fair-minded reasonably informed a member of the public would consider that the proper administration of justice required the lawyer be prevented from acting at all times giving due weight to the public interest that a litigant should not be deprived of his or her choice of lawyer without good cause.[75]

She also referred to the New South Wales case of *Kallinicos v Hunt* [76] where Brereton J undertook a comprehensive examination of the authorities concerning the courts supervisory jurisdiction over borders. She approved of his summary, which was in these terms:

> (a) The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a lawyer should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.
>
> (b) The jurisdiction is exceptional and is to be exercised with caution.
>
> (c) Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause.
>
> (d) The timing of the application may be relevant, in that the cost, inconvenience and impracticality of requiring lawyers to cease to act may provide a reason for refusing to grant relief. [77]

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[75] *GT Corporation Pty Ltd v Amare Safety Pty Ltd* [2007] VSC 123, [91].
[76] *Kallinicos v Hunt* (2005) 64 NSWLR 561.
[77] *GT Corporation Pty Ltd v Amare Safety Pty Ltd* [2007] VSC 123, [19], quoting *Kallinicos v Hunt* (2005) 64 NSWLR 561, 582-3.

Her Honour also dealt with the dilemma faced by people who receive what is plainly inadvertently disclosed documents. In paragraph 23 she said that:

> This case also raises the dilemma which confronts solicitors when confidential information is inadvertently disclosed to them. In 1993, the Law Institute of Victoria promulgated the current "Inadvertent Disclosure Guidelines", which set out solicitors' ethical duties in such a situation. Those duties include a duty to pass on to a client and use all information which is material to the client's interests regardless of its source, unless the solicitor knows it has been obtained unlawfully, improperly or surreptitiously. If privileged information inadvertently comes to the solicitor's knowledge, the solicitor is entitled and may have a duty to use the information for the client's benefit. If it is obvious that confidential documents have been mistakenly disclosed, the solicitor should consider whether to obtain instructions from the client to read or continue to read the material and should advise the client that the court may enjoin any overt use of any such information. In seeking those instructions, the solicitor should point out to the client the risk that a court may grant an injunction prohibiting a solicitor from continuing to act, and the possible costs of retaining new solicitors (citations omitted).

After considering all the facts in some detail she eventually decided that in respect of counsel they should be prevented from acting and in the case of the solicitors they should not be removed but be subject to orders restraining the further use of the privileged material.

The remedy was quite drastic. Importantly it was not a case where there was any improper conduct, simply one where in respect of the barristers her Honour said:

> But, as the persons who would be cross-examining Amare's witnesses, there must be very real concerns about their capacity to put out of their mind everything they have seen in the folders of privileged documents. Mindful of the exceptional nature of the order, I have nevertheless come to the conclusion that a fair-minded, reasonably-informed member of the public would conclude that those counsel should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.

This is the matter of principle in a nutshell. Even having an appropriate legislative amendment to prevent waiver there is still this matter of principle, which will allow the court to intervene. Do we also legislate to repeal the courts powers or just leave it to consensual arrangements between parties?

Conclusion

To return to the purpose of the paper, which includes addressing issues regarding the costs and time effectiveness of electronic discovery, and the obstacles it poses for the judiciary, it is plain that the problem of increasing burden of discovery is with us to stay and will not go away.

It is the parties themselves when they make their application under part 21 of the UCPR who set the boundaries for the extent of discovery and consequently the costs involved in that exercise. It is for the Court in the exercise of its discretion to decide on the relevance of the discovery and whether in the circumstances discovery of that particular magnitude is justified.

Section 60 of the *Civil Procedure Act* 2005 is in the following terms:

> In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.

The complexity is easy to perceive. What is important will have to be assessed by the Court presumably having regard to, not only the subjective importance to the parties or the monetary value of the case, but also to other aspects such as the availability of court resources.

The Court has already been resorting to section 60 to limit costs in a number of areas. Two examples suffice:

1. *Wright v Public Trustee*

In *Wright v Public Trustee*[78] the plaintiff received a legacy of $10,000 by the will of the deceased, and a by an order of the court received an additional $50,000. The costs she was to incur in the proceedings were estimated to be $57,000. The Court considered s 60 and 98 of the *Civil Procedure Act* 2005, and the decision of Palmer J in *Sherborne Estate (No 2) Vanvalen v Neaves,*[79] and stated,

> the Court is required by the provisions of s 60 of the Act to recognise the principle of proportionality of costs. By any standards, in a case in which the original estimated length of hearing was one day and the costs for the

[78] *Wright v Public Trustee* [2007] NSWSC 1069.
[79] *Sherborne Estate (No 2) Vanvalen v Neaves* [2005] NSWSC 1003.

> plaintiff were estimated for that one day hearing to total in excess of $57,000m and the plaintiff was awarded only $50,000 as a result of the litigation, there seems to me to be a lack of proportionality between the amount of the plaintiff's costs and the outcome to the plaintiff.

It was then stated that this was an appropriate case where the plaintiff should not be entitled to receive out of the estate, costs in an amount which exceeded the amount awarded to the plaintiff by the Court. Thus an order was made of a nature sought by the defendant capping costs of the plaintiff at $50,000.

2. *Re Maureen Michael Management Pty Ltd*

Re Maureen Michael Management Pty Ltd[80] related to whether a liquidator should be able to recover claimed costs and fees from a company's non-trading trust account. In this case the Court held that the liquidator should not be allowed to, in the absence of a scheme which reduced the amount of his costs.

As a general proposition, it was found that where a liquidator finds himself in charge of a trust fund and administers it, the court will usually exercise its discretion to allow the liquidator remuneration and expenses out of the fund. However, where there is non trading trust, the liquidator must show he acted reasonably in relation to the trust fund. Here as the fund was small, about $50,000, the court could not see how the liquidator acted reasonably in accruing costs of approximately $26,000, and lawyers costs of $30,000. The court took into consideration s 60 *Civil Procedure Act* 2005, in coming to this conclusion. Young CJ in Eq stated:

[80] *Re Maureen Michael Management Pty Ltd* [2005] NSWSC 1044.

> A further relevant matter is the legislature's command in s 60 of the *Civil Procedure Act* 2005 that the principle of proportionality applies to legal costs.

There are a course of provisions in the practice note for the costs of discovery to be advised to the Court and this is starting to happen. In a number of cases before the Court the costs of discovery sought are substantial and the Court is often left with the impression that what is sought might have marginal relevance. These are obvious cases where the Court should consider proportionality of the costs involved and the matters referred to in s 60. Sometimes in these situations the Court shifts the burden of the costs of discovery to the party seeking such extensive discovery. Strangely in many such cases thereafter discovery that is actually put in place is substantially less than that which was originally sought.

It is difficult matter for the Court given resources available to it to spend detailed time investigating the relevance of all the areas sought for discovery. However the court is also given a direction in s 60 which it cannot ignore all and practitioners should expect to be required to justify the amount of costs incurred in any discovery application. Proportionality must be seen in the context of the total amount of the costs involved in a case and where the burden of such costs should fall in cases of marginal relevance of the discovery sought.

Unless these steps are taken the Chief Justice's prediction of killing the golden goose may come true and a large proportion of the smaller commercial litigation which is available to the profession will be much reduced, perhaps in the context of mediation.

This is an area where a co-operative approach between the profession generally and the courts might help to advance sensible procedures. The Court is always open to suggestions and is anxious to hear of the difficulties which might be encountered by the profession in complying with its procedures. For this reason I would like to spend some time dealing with questions and answers, which I might have of you or you, may have of me in relation to the matters which I have discussed in this paper. I wish to acknowledge the assistance of the commercial list researcher Sarah Danos in preparing this paper.

AFM:VAT

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

ASSOCIATE JUSTICE MACREADY

WEDNESDAY 20 FEBRUARY 2013

FAREWELL CEREMONY FOR HIS HONOUR FROM THE PROFESSION

MR M WILLMOTT SC: The Court has convened today to mark your Honour's retirement from the bench. In fact the last equity Associate Justice probably that will sit. The fact that the Court has met here for this purpose, witnessed by the members of the profession who have assembled here in large number, is proof of the respect and esteem with which your Honour is held.

On that point Mr C Simpson SC telephoned me yesterday that he regrets that he could not be here.

Your Honour has enjoyed a distinguished legal career and I should take some moments to give an account of it.

Your Honour graduated from the University of Sydney in 1964 with a degree of Bachelor of Laws. This achievement is the more remarkable because you studied part-time. Between 1959 and 1964 you were an articled clerk with Sly and Russell. On 6 March 1964 you were admitted as a solicitor of this Court. Between October 1964 and March 1976 your Honour was a partner in the firm Robson Cowlishaw and Macready. It was during these years that you studied again part-time by course work for a Master's degree. On 4 June 1969 you were awarded the degree Master of Laws by the University of Sydney.

On 12 March 1976 you were admitted as a barrister of this Court and you joined the seventh floor Wentworth Chambers, which has been the home of some very distinguished men and women, some of whom are here today. It was a floor with an impeccable pedigree. Its past members included two Chief Justices of the High Court (the Honourable Murray Gleeson and Sir Anthony Mason), a Chief Justice of this Court (Sir Laurence Street), a former Chief Justice in Equity Tom Waddell and other judges of this Court and the Federal Court. Today, apart from your Honour, Justices McColl, Hislop, White and Slattery are sitting as judges, all of whom were your former colleagues on the seventh floor.

The principal area of your practice at the bar was, of course, in equity. You were a prominent member of the junior equity bar. Your Honour has also achieved notable success in the areas of construction law, insurance law and aviation law.

On 3 June 1992 your Honour was appointed a Master in Equity. This was 16 years after you had begun your practice at the Bar. It was a time of deep personal tragedy for you upon the death of your wife. Your tenure as Master and more recently as Associate Justice has been remarkable. You have heard and determined many cases concerning, of course, trusts and estates but you have also heard many other matters assigned to the Equity Division -- cases in the Corporation, Commercial and Technical and Construction lists. For six months in 2002 you sat as an acting judge. Unaccountably, you were not appointed a judge of this Court. I am not alone in thinking and there are very many here who think you should have been.

The Family Provision Act 1982 came into force on 1 September 1983 and

it expired exactly 25 and a half years later, on 1 March 2009. During that quarter of a century you presided over claims brought under that Act for 17 years or more. Some claims, of course, were still left to be determined after 1 March 2009 that is for the greater part of the Act's existence.

The basic principles of the Act's application were not settled until the early 1990s. This coincided with your Honour's appointment as Master. Not only can you, I suspect, be credited with hearing more claims brought under the Act - I have not looked at the statistics but I am willing to wager my hunch is right -- but you more than anyone may be credited with the implementation of and refinement of those principles in a steady stream of consistent decisions. This provided the profession with a sure guidance from which we were able to advise litigants on an appropriate course they might take.

I should mention but two areas where, I believe, your Honour has been considerably influential, despite the occasional disturbance from the Court of Appeal. One is the instance of the adult child applicant who has become estranged from a parent. Always a difficult case. The other concerns the status, for want of a better word, of the surviving de facto spouse. In Carruthers v Marshall you took the view that a claim by a de facto widow should be approached in much the same way as one would deal with a de jure widow. The Court of Appeal in Marshall v Carruthers did not agree and, for reasons which I and others have not fully understood, quaintly perhaps, thought otherwise. I venture to suggest in practice the Court of Appeal's view no longer holds and your Honour's view prevails.

When a lawyer - whether a solicitor or barrister -- undertakes a case

she or her may often view it as no more than a duty. When appearing in a case before your Honour it became a pleasure. Your Honour was always courteous and considerate to the profession. After your appointment, perhaps unlike some others, you never appeared to forget the problems and difficulties a legal practitioner encounters during the maintenance of litigation.

Your Honour's judgements were always thorough and reasoned so that it was possible for any litigant to understand your Honour's conclusions. And they were always proper judgement in the classic form -- designed only to resolve the dispute between the parties.

In November last year Lord Neuberger, President of the United Kingdom Supreme Court, delivered a lecture about judgements. He spoke of the need for brevity in the form of “weeding out the otiose”. He related the story of a colleague whose history teacher marked on an essay ”APK” - “anxious parade of knowledge” and Lord Neuberger pointed out how this “APK” can often be an obstacle to the professional and lay reader being able properly and readily to discern the reasons for the judgement.

Your Honour’s judgements are always free of “APK” and were the better for it.

I do not know who coined the phrase “Justice is safe in his hands” - the author is unimportant. What we all thought and felt was that justice was always safe in your Honour's hands. I do not know of a single instance where a litigant - even one who had “lost” the case did not consider he or she had had a fair hearing before your Honour. This, surely, is the highest accolade and compliment that can be paid to any judicial officer.

We wish your Honour good health, happiness and contentment upon

your retirement. You will be missed. Your Honour has, as I understand, given up rowing but retained your pilot's licence. If we see and hear a light aircraft hovering over the Law Courts Building may we suppose it is your Honour keeping an eye on us.

May it please your Honour.

MR G SALIER: It is both a pleasure and privilege, although with a tinge of sadness, to speak today on behalf of the solicitors of New South Wales at this informal ceremony to mark the occasion of your Honour's retirement. I personally regret your Honour cannot grant me an adjournment or consider yourself part heard.

May I say at the outset according to the book of wedding etiquette if you cannot be witty you should be brief. This will be a very short address.

Your Honour completed your secondary education at Shore and then studied law at Sydney University graduating with an LLB. Your Honour was admitted as a solicitor in 1964 and practiced as such until 1976, in which year your Honour was called to the Bar where you practised with distinction until 1992.

If I may just pause there, I do not recall meeting your Honour in the years we would have shared as solicitors, but I do recall my first conscious meeting with your Honour, which was in the days your Honour used to handle the prosecutions for the then Builders Licensing Court. The hearings were conducted at St Leonards. I can recall the look on your Honour's face when I announced the name of the client I was representing. I felt my client was surely due for some form of custodial sentence.

Your Honour was appointed a Master of this Court in 1992 and served as such until 2005 when your Honour was appointed an Associate Justice, a position you held until this day.

Mr Willmott SC has very fairly covered your career on the bench. My colleagues and I have always found it a pleasure to appear before your Honour, not only because of your knowledge of the law and understanding of

legal principles, but because of the manner in which you conducted your Court. Your Honour's innate gentlemanleness assisted in overcoming any apprehension which normally accompanies Court appearances (such as today).

I have been fortunate to have appeared on many occasions before your Honour. We have had the occasional difficulty with self-represented litigants, but your Honour was always equal to the occasion. I can recall only once being slightly dismayed on learning what has happened before your Honour when my colleague, Richard Gulley, was seeking approval of some trust arrangement. My colleague told me your Honour was slightly concerned that he would be trustee of the approved trust for some 25 years. My colleague could not wait to inform me that your Honour's concern was not allayed when he informed you if he died in office I was his executor and trustee.

I always will be grateful for the courtesy you and your associate, Annabelle, have personally shown me over the years. As Mr Willmott has said, it is likely in the events that have happened that your Honour will be last Associate Justice of the Equity Division of this Court. It would be reasonable to think your Honour, as the saying goes, that they kept the good one until last.

On behalf of the solicitors of New South Wales I congratulate you on your distinguished service as a judicial officer of this Court for the past 20 years.

If the Court pleases.

ASSOCIATE JUSTICE MACREADY:

Thank you very much Mr Willmott and Mr Salier for your very kind comments, stories and inappropriate enlargements of the truth when you were talking about me today.

There are many different periods of a judicial career that one can look back on and reflect about. I still clearly recall the first early years and the many uncertainties that attended that time. Life as a judge started out with a private swearing in at 9.30 a.m. in the morning; my first case was listed at 10.15 a.m. Some person took me in tow and marched me down one of the back corridors in the Court here and said, “That’s the door you go in Sir. Shall we go in?” In those days there was no baby judge’s school or any prepatory work. One simply started without any initiation.

Normally it takes a couple of years to settle into a job and one then gets some confidence in ones own abilities and one can settle down and enjoy the Court process with all its ups and downs. At that period, and perhaps in the early and middle part of your career, you become confident and may be even overconfident at times but the Court of Appeal certainly knocks that out of you. Occasionally what the High Court does is change the law on you from what it was when I heard the case. I think one person I see sitting here today persuaded them to do just that. Many reversals are, of course, nothing more than another person seeing something in a slightly different light to the trial judge. Minds differ and one should not take it as a criticism. There is, of course, the odd occasion when it is pointed out clearly that one has made a mistake and that certainly tends to bring you back to reality.

As one approaches retirement you have a bit more time to reflect on what

it is all about. It is not about the exercise of power over parties. You realise that as a judge you have a far more important role, namely, that of a trustee or a guardian of the institution of which one is part. Even if one has been here for 20 years (which to me seems a very long time) it has to be seen in the context of the long history of this Court since 1823. Twenty years is merely a small part of something which will continue for a long time after I have left. Hopefully this Court and the service it provides the community will be here in the future for as long as it has been in the past. I am truly thankful for having had the chance to preserve the institution which fulfils such an important part in our society. Without that institution and the rule of law society would rapidly decay.

One of the more pleasurable aspects of being a judge is the relationship that one has with members of the profession. This has been spoken of by many but until one actually sits as a judge one does not really appreciate the full effect of the trust between the bench and the practitioner, be it a barrister or solicitor. It is that trust which leads to a substantial shortening of the time taken to hear cases and to prepare judgements in them. As many of you will know, judges can be reasonably predictable and that also assists in speeding up justice.

The relationship between the solicitors and the bench is also terribly important. I myself spend some 13 years as a solicitor after a period of five years as an article clerk before that. The proper preparation of cases is a demanding process which requires careful attention. If it is done well, time once again is saved. This is demonstrated on a daily basis in Court when, in respect of the well-prepared case, affidavits are rarely objected to and the hearing time is not wasted dealing with objections and leading the evidence

that should have been led in the first place. It has been a true privilege working with the profession over my time as a judge and I thank you for your assistance.

There are, of course, many people who have helped me in my position. Many of you will know my associate, Annabelle Wilson and. her replacement during Annabelle's sickness, Tanya Waterhouse. You also have a lot to thank Annabelle for because she has been the one who, for the last 20 years, has continuously corrected my grammar in my judgements. I had to repeat the Leaving Certificate in order to get a Commonwealth Scholarship and I required full time coaching to even get through English on both occasions. Fortunately, I had Annabelle. Without her they certainly would not have read as they have. I thank her for all her support over the 20-year period we have been together.

At many times in the past I have had various court officers who come from different backgrounds, whether they are law students or others and they have also contributed enormously. My present court officer Bo-ok Won, has been tireless in her work for me. I am also fortunate to have had services of many researchers. They normally occupy the position for about a year and it is really a transition period before they go on to work in the profession. Working with them is always fun and they, including my present researcher, Vicki, who is here today, have invariably been extremely helpful in all their work and support.

You will observe that I, like many judges in the Court, have from time to time shown frustration at the lack of documentation and the state of the Court files. References to "the black hole in the basement" spring to mind. That is but a passing irritation, because I acknowledge that there is an enormous

amount of work done by the staff of the registry, registrars and all support personnel in the Court. What has become apparent to me is that they have had to work under tighter and tighter budgetary constraints over recent years, which means they simply work harder in difficult conditions. I thank them for their work.

Another important group are, of course, the court reporters, who support us in Court.

I am lucky to have Annette Mahoney as my reporter today. She has, over the years, been one of my constant court reporters. Some others, such as David Eyre and Patrick Yip, have also been constant reporters for me. They, and all the other reporters who have come to my Court from time to time, I thank for their efforts.

My thanks go to my family and my partner, Lyn, for all their support over the years. As we are both professionals, evening discussions about each other's professional day sort out what has to be done.

Finally, can I thank all of you for coming today? You do me a great honour by coming to this informal function. I appreciate it. I am extremely pleased and thankful for the organisation of it.

Accordingly, ladies and gentlemen, I will adjourn the Court.

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